88-1893

No. ——

Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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GAIL MARIE KING,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 22, 1989

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## QUESTION PRESENTED

Whether the decision below correctly held, in conflict with the decisions of the First and Eleventh Circuits, that petitioner's felony conviction could be sustained despite the fact that the indictment returned by the grand jury charged a fundamentally different criminal offense from the one on which petitioner ultimately was convicted.

## LIST OF PARTIES

Norman Bradley Fowler, Randall William Fowler, Roy Leon King and Paula Hill Dedeaux were also parties in the proceeding below.

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IN THE

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No. ———

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GAIL MARIE KING,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Gail Marie King hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is unreported. There is no reported opinion from the United States District Court for the Western District of North Carolina in this case.

## JURISDICTION

The opinion of the court of appeals was entered on February 24, 1989, and a petition for rehearing was denied on March 23, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

U.S. Const. amend V.

At the time the indictment in this case was handed down, the federal mail fraud statute provided in relevant part that

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined not more than $1000 or imprisoned not more than five years or both.

18 U.S.C. § 1341.

## STATEMENT

On December 3, 1986, petitioner was indicted in the Western District of North Carolina, Charlotte Division, on 12 counts of a 29 count indictment which alleged one count of conspiracy to commit mail fraud (18 U.S.C. § 371) and 28 counts of mail fraud in violation of 18 U.S.C. § 1341. Petitioner was convicted after trial on the mail fraud counts on which she was indicted and on the conspiracy count. She has been sentenced to three years imprisonment on the conspiracy count and three years imprisonment on the mail fraud counts collectively, sentences to be served concurrently, and fined $3000.00. The activities forming the basis for the indictment and

conviction involve petitioner's role in the provision of certain academic diplomas through the mail.[1]

1. The scheme-or-artifice section of the indictment returned against petitioner specifically charged that she devised "a scheme and artifice to defraud the citizens of the State of North Carolina and of other states within the United States of their *expectation* of" properly educated, trained and qualified persons holding degrees from legitimate and accredited institutions. Indictment at p. 2 (emphasis added). Nowhere in the description of the scheme to defraud did the indictment mention any allegation that *any* person was defrauded of money or property.

On June 24, 1987, after the indictment was returned in this case, but before trial, this Court handed down its decision in *McNally* v. *United States*, 483 U.S. 350 (1987), which held that a federal mail fraud conviction required an allegation and proof of some injury to money or property of the putative victim of the scheme. Based on the *McNally* decision, petitioner on July 17, 1987, filed a pro-se motion to dismiss the indictment, arguing that the indictment charged only a deprivation of North Carolina citizens' intangible expectations with regard to the significance of the diplomas. Shortly after the government received petitioner's motion to dismiss, it announced that it would seek a reindictment. Response for Motion to Dismiss Indictment, August 17, 1987, at 3. However, because of an obvious concern that reindictment would be barred by the statute of limitations, the government ultimately reversed its position and decided to defend its original indictment. *Id.* at 3-4.

On September 2, 1987, the District Court for Western District of North Carolina denied petitioner's motion to dismiss the indictment. The district court held that the

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[1] The diplomas were not forgeries of the diplomas of existing colleges and universities. Instead, the defendants supplied academic degrees on the basis of the customer's work experiences.

passing references in the indictment to "fees" and "tuition" paid by petitioner's *customers* (who were not the alleged "victims" of the scheme) were sufficient to avoid dismissal under *McNally*.[2] App., *infra*, 5a-7a. The trial court held, in the alternative, that any *McNally* concerns raised by the indictment could "be taken out of the case upon appropriate trial motions and jury instructions." *Id.* at 7a.

In an effort to purge the indictment of its obvious defects under the *McNally* decision, the district court allowed the indictment to be revised extensively. Under this heavily revised indictment, the government proceeded to try the case on the theory that petitioner's alleged scheme had, in fact, defrauded persons of money and property and the jury was instructed on such a theory.

2. On appeal, petitioner argued that the trial court erred in not dismissing the indictment for failure to state a cognizable crime under the mail fraud statute. Brief of Appellant at 36-44. Petitioner further argued that she had been deprived of her Fifth Amendment right to a grand jury because the theory on which she was tried and convicted was fundamentally different than that charged by the grand jury. *Id.* In its opposing brief on the merits, the government argued that even if the district did err in denying petitioner's motion to dismiss, such an error was harmless because the case ultimately was tried on the theory that petitioner had defrauded certain victims of money. Brief for the United States,

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[2] The references to "fees" and "tuition" relied upon by the court were wholly irrelevant to the harm alleged in the indictment; rather, these references were offered to show the nature of petitioner's scheme to defraud. The purchasers of the diplomas--petitioner's customers--were not "victims" of fraud; they clearly knew what they were purchasing. Rather, according to the theory of the indictment as handed down by the grand jury, the citizens of North Carolina—who were "misled" as to the validity or meaning of the diplomas—were the victims of the alleged scheme.

October 14, 1988, at 41. The Fourth Circuit affirmed petitioner's convictions without even addressing the issue. App., *infra*, 3a-4a.

## REASONS FOR GRANTING THE PETITION

Under any fair reading of the indictment in this prosecution, it is obvious that the grand jury indicted petitioner for conduct that did not constitute a crime cognizable under the federal mail fraud statute, as authoritatively construed by this Court in *McNally* v. *United States*, *supra*. Thus, in affirming petitioner's convictions, the Fourth Circuit adopted the position that a person can be convicted of a crime on a theory fundamentally at odds with the one on which the grand jury returned its indictment. Such a position not only is an egregious affront to the constitutional requirement of a grand jury, it is also squarely at odds with the holdings of the First and Eleventh Circuits on this issue. This Court should grant certiorari and clarify the latitude afforded a trial court and prosecutor in deviating from the theory of the crime charged by the grand jury in the indictment.

### Petitioner Was Deprived Of Her Fifth Amendment Right To A Grand Jury When She Was Convicted Under A Theory Of Mail Fraud That Was Fundamentally At Odds With The Theory Presented To The Grand Jury Which Returned The Indictment.

1. In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the federal mail fraud statute, 18 U.S.C. § 1341, only proscribes schemes to defraud which deprive their victims of money or property rights and that Section 1341 does not proscribe frauds which merely deprive persons of "intangible rights." It is obvious, for several reasons, that the indictment in this case, scrutinized under the legal standards laid down in *McNally*, was fatally flawed.

First, the *plain language* of the indictment, read as a whole, alleges harm only to intangible rights of the citizens of North Carolina. In the indictment, the grand jury charged that petitioner devised "a scheme and artifice to defraud the citizens of the State of North Carolina and of other states within the United States of their *expectation* of" properly educated, trained and qualified persons holding degrees from legitimate and accredited institutions. Indictment at p. 2 (emphasis added). Nowhere in the description of the scheme to defraud does the indictment allege that *any* person would be defrauded of money or property.[3] Under *McNally*, the indictment patently failed to allege a crime cognizable under 18 U.S.C. § 1341.

Second, the government's initial announcement, shortly after petitioner filed her pretrial motion to dismiss, that it would seek a superseding indictment and incorporate an appropriate claim of monetary injury under *McNally*, constitutes strong evidence that the indictment, in fact, involved no more than a claim of injury to "intangible rights." The government never would have contemplated seeking a superseding indictment unless it recognized the

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[3] As noted *supra* at note 2, the United States suggested in the district court that the indictment could be read to allege that recipients of diplomas would be defrauded by paying "tuition" or "fees" in exchange for diplomas from appellants. That argument is flatly incorrect. The passing references to "fees" and "tuition" in the indictment had nothing whatsoever to do with any allegation that a person would be deprived of money as a result of fraud, as required by *McNally*. Rather, the indictment makes it clear that the alleged "victims" of the "fraud" were the citizens of North Carolina and there is no allegation that these "victims" were deprived of any money. Moreover, it would be ludicrous to suggest that the customers who paid the "tuition" or "fees" were victims of fraud. To the contrary, those persons received exactly what they paid for—unless the government is contending that they, like the scarecrow in the Wizard of Oz, believed that the mere possession of a diploma would make them smarter. In any event, that was not the theory of the indictment as handed down by *the grand jury*.

insufficiency of the original indictment. Nor is there any reason to doubt that the government asked the grand jury to indict exclusively under an "intangible rights" theory. Prior to *McNally*, such indictments—alleging no harm to property—were commonplace. See *McNally*, 483 U.S. at 354-355.

Finally, the government's strained argument that the indictment in this case satisfies *McNally* is based on a single reference in the indictment to "money," which appears *not* in the description of the scheme-or-artifice-to-defraud section, but rather in the boilerplate language quoting directly from the statute and buried inconspicuously in the separate counts of the indictment.[4] In sum, no fair reading of that indictment leads to the conclusion that the grand jury in this case indicted petitioner of a cognizable offense of mail fraud after *McNally*.

2. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. Const. amend V. This fundamental right to a grand jury, which safeguards the individual's right to be free from unwarranted prosecutions,[5] has been eviscerated in this case because the pros-

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[4] The quotation from the statute in the various counts of the indictment simply is irrelevant, because the indisputable, discrete purpose of the indictment was to allege a scheme to defraud the citizens of North Carolina of certain expectations. *See United States* v. *Curtis*, 506 F.2d 985 (10th Cir. 1974) (not sufficient merely to quote the language of the statute in the indictment).

[5] *See* Harrison (ed.), *Project: Criminal Procedure*, 75 Geo. L.J. 859, 869 n.1113 (1987), *citing Branzburg* v. *Hayes*, 408 U.S. 665, 686-87 (1972) (role of grand jury to protect citizens from unfounded prosecutions); *United States* v. *Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion) (dictum) (grand jury shields against arbitrary and oppressive action by requiring representative body of citizens to determine whether to bring charges); *United States* v. *Calandra*, 414 U.S. 338, 342-43 (1974) (grand jury protects against arbitrary prosecutions); *United States* v. *Thomas*,

ecutor was allowed to try a case on a theory fundamentally at odds with the theory upon which the grand jury returned the indictment. See *Stirone* v. *United States*, 361 U.S. 212, 217-19 (1960) (amendment of indictment alleging obstruction of sand importation when evidence showed interference with steel exportation violates Fifth Amendment grand jury clause); *United States* v. *Smith*, 789 F.2d 196, 200 (3d Cir.) (amendment of indictment constitutes per se violation of Fifth Amendment grand jury clause since terms of indictment are altered), *cert. denied*, 479 U.S. 1017 (1986).[6]

Despite petitioner's Fifth Amendment rights, the United States argued, in opposing petitioner's pretrial motion to dismiss the indictment, that, even if the indictment failed to allege injury to money or property, petitioner's convictions nonetheless should be affirmed because

> any ambiguity in the language of the Indictment, after the *McNally*, *supra*, decision could and should be cured by jury instructions . . . making it clear that the scheme alleged to have something to do with the defrauding of persons of some money or property interest.

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788 F.2d 1250, 1254 (7th Cir.) (grand jury designed principally to prevent prosecution from subjecting innocent people to burden and trauma of trial), *cert. denied*, 479 U.S. 853 (1986).

[6] *See also* 75 Geo. L.J. at 902 n.1308, *citing United States* v. *Parkhill*, 775 F.2d 612, 615 (5th Cir. 1985) (implicit or constructive amendment is reversible error per se); *United States* v. *Mosley*, 786 F.2d 1330, 1335 (7th Cir.) (implicit or explicit amendment reversible error per se), *cert. denied*, 476 U.S. 1184 (1986); *United States* v. *Begnaud*, 783 F.2d 144, 147 & n.4 (8th Cir. 1986) (amendment of indictment violates principle that defendant may be tried only on charges presented by indictment and so is reversible error per se); *United States* v. *Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985) (substantive amendment of indictment, especially if amendment expands or alters offense charged, fatal error since defendant's fifth amendment right to stand trial only on charges made by grand jury indictment violated).

Response to Motion to Dismiss Indictment, August 17, 1987, at 3. The government reiterated this argument in its brief to the Fourth Circuit.[7] Thus, by affirming petitioner's conviction, the Fourth Circuit necessarily adopted the position that a flawed indictment could be cured through jury instructions or motions at trial. In so holding, it placed itself in a position which is in direct conflict with a decision of the Eleventh Circuit, see *United States* v. *Italiano*, 837 F.2d 1480 (11th Cir. 1988), and of the First Circuit, see *United States* v. *Santa-Manzano*, 842 F.2d 1, 3 (1st Cir. 1988).

3. In *Italiano*, appellant was indicted under Section 1341 for bribing a county commissioner in the hope of obtaining a cable television franchise. The indictment did not allege a deprivation of money or property. After his conviction, but before his appeal to the Eleventh Circuit was decided, the Supreme Court issued its decision in *McNally*. In an attempt to preserve its conviction, the government argued that even though the indictment did not allege by its terms a deprivation of money or property, it did allege bribery under Florida law and bribery was, even under *McNally*, actionable under Section 1341. *Italiano*, 837 F.2d at 1485. The Eleventh Circuit refused even to consider the merits of the government's bribery argument, stating that it was "irrelevant" because it was "not the theory upon which the grand jury returned its indictment." *Id.*

According to the Eleventh Circuit, it would be "an affront to our criminal justice system to permit an accused

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[7] In its brief on the merits, the government attempted to defend its fatally flawed indictment by stating:

> [t]he government . . . proceeded to try the cause on the theory that appellants defrauded both innocent individuals of tuition money and defrauded employers who extended jobs and pay raises to holders of bogus degrees. At the conclusion of the trial, the jury was instructed that it had to find that appellants had defrauded their victims of money or property.

Brief of United States, October 14, 1988, at 41.

to be subject to jeopardy based on facts which were not presented to nor found by the grand jury." *Id.* at 1486. The Eleventh Circuit further stated:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented, to the grand jury which indicted him.

*Id., citing Russell* v. *United States*, 369 U.S. 749, 770 (1962).

The Eleventh Circuit further noted that the "basic protection" of the grand jury has been a part of our heritage for over a century:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by grand jury . . . [would] be frittered away until its value [was] almost destroyed. . . .

*Id., quoting Ex parte Bain*, 121 U.S. 1, 10 (1887).

Thus, because under the "plain language of the indictment," "the gravamen of the indictment" was that citizens of Florida would be deprived of their intangible right to honest government, the Eleventh Circuit held that "the government [could] not . . . seek to uphold Italiano's conviction on facts and theory different from that charged by the grand jury." *Id.*

Applying the law of the Eleventh Circuit, as enunciated in *Italiano*, petitioner's conviction in this case should

have been reversed because it was obtained on a theory which is fundamentally different from the theory presented to the grand jury. As mentioned above, the gravamen of the indictment alleges harm to the "expectations" of North Carolina citizens. Consequently, even if the government were correct—although clearly it is not—in arguing that some people were defrauded of money or property as a result of the alleged scheme, the conviction nevertheless should be reversed because the grand jury did not return an indictment on that theory.

4. The First Circuit, in applying *McNally*, also has held that "it is not lawful to convict a defendant 'of an offense *not charged in the indictment*' . . . ." *United States* v. *Santa-Manzano*, 842 F.2d 1, 3 (1st Cir. 1988), *citing United States* v. *Miller*, 471 U.S. 130, 135-38 (1985) (*quoting* with emphasis *Stirone* v. *United States*, 361 U.S. 212, 213 (1960)). In *Santa-Manzano*, the court observed that the government's case "may make out a scheme to defraud [under *McNally*], but it is not the scheme the indictment charges." *Id.* at 2. Therefore, the court stated that because "the Fifth Amendment assures the defendant that the government will try him on the charges that the grand jury voted, not on some other 'charges that are not made in the indictment against him,'" the conviction had to be reversed. *Id.*, *quoting Stirone*, 361 U.S. at 217.[8]

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[8] The Sixth Circuit has also determined that jury instructions cannot salvage a conviction when the indictment, as in this case, is fatally defective. *See, e.g., United States* v. *Murphy*, 836 F.2d 248, 254 (6th Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 307 (1988) ("the scheme and artifice as charged in the indictment . . . does not state a crime" under *McNally* and the indictment must therefore be dismissed, irrespective of the merit of the jury instructions); *United States* v. *Baldinger*, 838 F.2d 176, 181 (6th Cir. 1988) (failure to allege a crime in the indictment is an error "more fundamental" than a similar error in jury instructions and such an indictment must be dismissed).

Thus, had petitioner been convicted in either the First or Eleventh Circuit—rather than the Fourth—her conviction would have been reversed because of the failure of the indictment to conform to the post-*McNally* mail fraud requirements. The fundamental constitutional protection afforded by grand jury indictment should not be made to rest on the part of the country in which a person happens to reside. Accordingly, given the significant constitutional right at stake and the conflict in the circuits regarding this issue, the Court should grant certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 22, 1989

* Counsel of Record

# APPENDICES

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 87-5167

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee*

v.

RANDALL WILLIAM FOWLER,
*Defendant-Appellant*

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No. 87-5198

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*

v.

NORMAN BRADLEY FOWLER,
*Defendant-Appellant*

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No. 87-5199

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*

v.

GAIL MARIE KING,
*Defendant-Appellant*

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No. 87-5200

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*

v.

ROY LEON KING,
*Defendant-Appellant*

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No. 87-5201

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee*

v.

PAULA HILL DEDEAUX,
*Defendant-Appellant*

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Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief District Judge & David B. Sentelle, District Judge. (CR-86-100-C)

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Argued: January 9, 1989 Decided: February 24, 1989

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Before RUSSELL and WILKINS, Circuit Judges, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

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David L. Harris (LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN, P.C., on brief); Robert Crawford Ervin, Jr. (BYRD, BYRD, ERVIN, WHISNANT, MCMAHON & ERVIN, P.A.; Jesse J. Waldon, Jr., DONAT, WALDON & JOHNSON; Fritz Y. Mercer, Jr., CARSON & MERCER, on brief) for Appellants. Andrew Levchuk (UNITED STATES DEPARTMENT OF JUSTICE; Thomas J. Ashcraft, United States Attorney, Debra Jo Stuart, Assistant United States Attorney, on brief) for Appellee.

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PER CURIAM:

Randall William Fowler, Norman Bradley Fowler, Gail Marie King, Roy Leon King and Paula Hill Dedeaux (Defendants) appeal from convictions of mail fraud and conspiracy to market and sell fraudulent university degrees and transcripts. 18 U.S.C.A. § 1341 (West 1984); 18 U.S.C.A. § 371 (West 1966); 18 U.S.C.A. § 2 (West 1969). We affirm.

When viewed in the light most favorable to the government, the evidence presented at trial demonstrates that Defendants offered for sale, through advertisements placed in various magazines and tabloids, a variety of undergraduate, graduate and professional diplomas based on credit for "life experience." The diplomas were awarded from bogus institutions named after legitimate, accredited colleges.

Although Defendants were charged and convicted of a single conspiracy, they assert that the evidence established multiple conspiracies regarding the issuance of diplomas by DePaul University, operated by the Kings, by Roosevelt, Lafayette, Loyola, and Cromwell Universities, operated by the Fowlers and Dedeaux, and by the University of England at Oxford and the University of Southern California, operated by two unindicted individuals. Defendants argue primarily that they were prej-

udiced by the introduction of evidence regarding issuance of diplomas by the University of Southern California and the University of England at Oxford.

First, the district court properly instructed the jury to disregard any evidence concerning the University of Southern California and the University of England at Oxford. Further, the existence of a single conspiracy or multiple conspiracies is generally an issue for a properly instructed jury. *United States v. Lozano*, 839 F.2d 1020, 1023 (4th Cir. 1988). Here, the district court specifically instructed the jury that the government was required to prove a single conspiracy. And, the evidence regarding the relationships of Defendants and their intertwined operations was sufficient to support a finding of a single conspiracy.

Defendants' remaining allegations of error are also without merit and do not warrant discussion.

*AFFIRMED.*

## APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

---

Criminal No. C-CR-86-100

UNITED STATES OF AMERICA

vs.

NORMAN BRADLLEY FOWLER, RANDALL WILLIAM FOWLER, LYNNE CECELIA IVORY, GAIL MARIE KING, ESTELLE VIOLA STEWART, ROY LEON KING, PAULA HILL DEDEAUX

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## COMPREHENSIVE ORDER ON OUTSTANDING MOTIONS

[Filed Sept. 2, 1987]

THIS MATTER was reassigned to the undersigned by Order of the Honorable Chief Judge Robert D. Potter dated August 26, 1987. It now appearing to the Court that there are outstanding a number of motions not yet disposed of by order or other ruling of the Court, the same are now disposed of as follows:

I. Motions to dismiss the indictment—July 7, 1987, the defendants jointly moved to dismiss the indictment. August 6, 1987, defendants jointly under the title "Petition for the Court to Act Habeas and Motion to Halt

Prosecution's Outrageous Conduct Stalling Misuse of the Law," reiterated that motion. August 10, 1987, all defendants either renewed that motion or filed a memorandum in support of the motion. In addition, the defendant R. W. Fowler, on August 9, 1987, filed a separate habeas petition directed to the same alleged insufficiency of the indictment. The defendants' motion is based on the decision of the United States Supreme Court in *McNally v. United States*, 55 L.W. 5011, 96 L.Ed.2d ——, —— U.S. —— (1987). That case held that the mail fraud statute, 18 U.S.C. § 1341, was designed to protect property rights against fraudulent conduct and had no applicability to the protection of "intangible rights" such as the lawful functions of government. The defendants here argue credibly and, at one point, the government seemed to concede that the instant indictment is invalid in that it charges:

> "a scheme and artifice to defraud the citizens of the State of North Carolina and of other states within the United States, of their expectation of properly education, competent, appropriately trained and tested, and otherwise qualified, legal, educational, psychological, engineering, business and health consultation and assistance from trained persons and professionals purportedly having received degrees, certificates, diplomas, and transcripts from legitimate, accredited and qualified institutions with legitimate authority to provide such training and confer such degrees to enable such persons to provide the aforedescribed legal, educational, and other services."

Nothing else appearing, this might well entitle the defendants to the relief sought in these motions. However, in this case, much else does appear. The indictment, among other things, alleges on Page 6 that the scheme

included the receipt of fees in the form of "full tuition" and on Page 8 that the defendants "well had reason to believe . . . that certain graduates would erroneously believe that the degrees . . ." were valid equivalents of other degrees, etc. Therefore, however inartfully, the indictment charges at the very least a scheme and artifice to defraud the purported degree holders out of their property well within the realm of fraud staked out as being validly within the scope of the mail fraud statute under the *McNally* decision, *supra*. Therefore, the portions of the indictment attacked by the defendants are at worse surplusage and as *McNally* points out can be taken out of the case upon appropriate trial motions and jury instructions.

II. Motions to receive expenses—All defendants moved August 20, 1987, for an award of expenses for travel, board, etc., during trial. The similar motion of defendant Ivory made June 23, 1987, was denied by the Honorable Chief Judge Potter who noted that this Court is without authority to order payment of such expenses. *See* 18 U.S.C. § 3006A. For the same reasons, the motions now before the Court must be denied as well. The defendant Ivory's motion to subpoena herself of June 24, 1987, is an attempt to do indirectly what the prior order forbids doing directly and the same is DENIED.

III. Motions for discovery—August 17, 1987, all seven defendants joined in a motion "for expansion of time to expand the 'open file' of the U.S. Attorney's office, FBI, IRS investigations, and other items known to the U.S. including matters discoverable under Rule 16 of the Federal Rules of Criminal Procedure." Additionally, the defendant N. Fowler moved August 18, 1987, for updated *Brady* materials and other favorable materials; for notice of the government's intention to use certain evidence; and for a completed updated list of witnesses. While the

government remains, of course, subject to the requirements of the *Brady* rule and Rule 16, the instant motions go far beyond those obligations and, furthermore, are not timely under this District's Order pursuant to Fed. R. Crim. P. 12(c). Likewise, the outstanding motions for a bill of particular of the defendant Stewart will be denied for the same reasons.

IV. Motions for change of venue—The defendant Stewart moved January 28, 1987, and the defendant Ivory July 24, 1987, for change of venue. The subsequent orders in regard to the defendant Stewart carry the plain implication of denial of that motion but apparently it has never been explicitly ruled upon. On April 8, 1987, Chief Judge Potter denied the similar motion of the defendant King. There having been no severance, this Court will now, for the reasons set forth in Judge Potter's opinion, deny the motions of the defendants Stewart and Ivory.

V. The United States Attorney is ORDERED to respond to the motions to quash the subpoenas based on the marital privilege on or before September 9, 1987. The Court expressly withholds ruling on these two motions pending receipt of the response from the United States.

VI. Miscellaneous—The defendant N. Fowler has petitioned the Court for habeas corpus to permit him to attend his own trial. Since the defendant is in federal custody being detained precisely for the purpose of attending this trial, the petition does not necessitate the granting of a writ. It is further possible that between the undersigned and the Honorable Chief Judge Potter some one motion among the multitude filed by defendants herein has been overlooked. It would be the intent of this Court at this time to deny such motion without prejudice to a defendant's right, if any, to renew the same if it affects some one or more of his substantive rights.

VII. With the exception of the motion for continuance disposed of in a separate order, all other motions docketed after August 20, 1987, will be considered and ruled on the first day of trial, September 16, 1987.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motions of the defendants as above set forth are DENIED.

THIS the 2 day of September, 1987.

/s/ David B. Sentelle
DAVID B. SENTELLE
United States District Court
Judge

Supreme Court, U.S.
FILED
JUL 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1893 and 88-7305

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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GAIL MARIE KING, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

RANDALL WILLIAM FOWLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether the indictment charged that the victims of petitioners' scheme to defraud were deprived of money or property within the meaning of 18 U.S.C. 1341 as interpreted by this Court in *McNally* v. *United States*, 483 U.S. 350 (1987).

2. Whether petitioner Randall Fowler was denied due process in his sentencing proceeding.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 88-1893

GAIL MARIE KING, PETITIONER

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-4a)[1] is unreported.

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[1] "Pet. App." refers to the appendix to the petition filed by petitioner King in No. 88-1893.

## JURISDICTION

The judgment of the court of appeals was entered on February 24, 1989. A petition for rehearing was denied on March 23, 1989. The petitions for a writ of certiorari were filed on May 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioners were convicted of participating in a mail fraud conspiracy that involved the sale of bogus university degrees and transcripts, in violation of 18 U.S.C. 371. In addition, petitioner Randall Fowler was convicted on two counts of mail fraud and three counts of aiding and abetting mail fraud, and petitioner Gail King was convicted on ten counts of mail fraud, all in violation of 18 U.S.C. 1341. C.A. App. 1481-1487. Petitioner Fowler was sentenced to seven years' imprisonment and was fined $10,000. Petitioner King was sentenced to three years' imprisonment and was fined $3,000. C.A. App. 1628-1629. The court of appeals affirmed. Pet. App. 1a-4a.

1. The evidence at trial showed that petitioners and their co-defendants operated a fraudulent scheme to market and sell bogus diplomas and transcripts from nonexistent "universities" named after legitimate, accredited institutions. For example, an FBI agent responded to an advertisement in *The National Enquirer* offering college degrees by mail. In response, he received from petitioner Gail King a brochure describing the "Advanced Study Program" of "DePaul University." The brochure represented that "DePaul University is a major public University offering fully accredited Associate degrees, Masters degrees, Ph.D.'s (all with transcripts), entirely through evaluation

of your current knowledge and life experiences." C.A. App. 2194. All that an applicant needed to provide was "a resume of life work, educational experiences or a written authored published work," the brochure stated, along with the required tuition. *Id.* at 2195. The brochure represented that DePaul was accredited by the Worldwide Accrediting Commission, which does not exist. The agent completed the application form in the brochure, indicating that he was an accountant who "admired the legal profession" and sought a "bachelor of laws" degree. He enclosed a check for $600 and asked that the degree be backdated to 1959. *Id.* at 2203-2206. The agent was awarded the degree and given phony transcripts.

Petitioner Randall Fowler ran "Loyola University." The evidence showed that a postal inspector purchased a "bachelor of science in business administration" degree from Fowler, along with a Loyola transcript reflecting the inspector's performance in courses he never took. GX 87.

2. The indictment, which was returned prior to this Court's decision in *McNally* v. *United States,* 483 U.S. 350 (1987), charged in part that petitioners had schemed to defraud United States citizens "of their expectation of properly educated, competent, appropriately trained and tested, and otherwise qualified, legal, educational, psychological, engineering, business, and health" personnel. C.A. App. 14.[2] Petitioners challenged this "intangible rights" allegation before trial by moving to dismiss the indictment. The district court, after reciting the language quoted above, stated that, "[n]othing else appearing, this might well entitle the defendants to the relief sought." Pet. App. 6a. "However," the court continued, "much else does

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[2] The indictment is reprinted in the Appendix to No. 88-7305. As reprinted in that appendix, the indictment contains the page numbers it was given in the court of appeals appendix.

appear." *Ibid.* For example, the court noted, the indictment alleged that petitioners " 'well had reason to believe . . . that certain graduates would erroneously believe that the degrees . . .' were valid equivalents of other degrees." *Id.* at 7a (quoting a portion of the indictment reprinted at C.A. App. 19). Accordingly, the court held, "the portions of the indictment attacked by the defendants are at worst surplusage and as *McNally* points out can be taken out of the case upon appropriate trial motions and jury instructions." Pet. App. 7a. The government proceeded to try the case on the theories (also contained in the indictment) that petitioners had defrauded innocent individuals of tuition money and had defrauded employers who extended jobs and pay raises to holders of bogus degrees. The intangible rights language was redacted from the indictment in the jury charge.

3. On appeal, petitioners primarily argued that they had been charged with a single conspiracy while the evidence showed multiple conspiracies, and that they had been prejudiced by the introduction of evidence concerning degrees granted by the "University of England at Oxford" and the "University of Southern California," bogus diploma mills operated by unindicted persons. The court of appeals rejected their claims, noting that the jury had been instructed that it was to disregard evidence concerning the University of England at Oxford and the University of Southern California and that the government was required to prove a single conspiracy. Pet. App. 3a-4a. With respect to the issues petitioners contend warrant review by this Court, the court of appeals concluded simply that their contentions were "without merit and do not warrant discussion." *Id.* at 4a.

## ARGUMENT

1. Petitioners, alleging that the indictment included intangible rights charges only, contend that they were convicted of crimes not charged in the indictment. There is no factual basis for this contention, which was rejected by both lower courts.

As the district court stated (Pet. App. 6a), the indictment included intangible rights allegations. However, as the district court also concluded (*id.* at 6a-7a), the indictment charged more than that. Specifically, the indictment alleged that some purchasers of diplomas would be deceived by petitioners' scheme and "would erroneously believe that the degrees, diplomas, and certificates would be equivalent to such degrees, diplomas, and certificates of traditional, legitimate, accredited colleges and universities throughout the world." C.A. App. 19. Thus, the indictment charged that some persons would believe that their life experiences qualified them for the degrees they sought and would pay their "tuition" in good faith.[3]

The indictment further alleged that persons who purchased bogus credentials would present them "to em-

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[3] The evidence presented at trial proved that allegation. Among the numerous innocent purchasers victimized by the scheme was the Reverend James Johnson, who believed that "Roosevelt University" was a legitimate institution with a faculty that would give credit for his 20 years of experience in the ministry and prior academic work. He accordingly paid more than $500 for a worthless "master of divinity" degree from Roosevelt. C.A. App. 775-777. Calvin Gregory, an insurance agent who paid $730 to purchase a "Cromwell University" degree, wrote to the "West European Accrediting Society" to confirm Cromwell's status. He received a computer print-out (purportedly from the accrediting agency but actually from petitioners) stating that Cromwell was a fully accredited institution with an "A-1" rating. Gregory thus believed that he was dealing with a legitimate institution. C.A. App. 809-811, 821.

ployers, organizations, institutions and individuals seeking legal, health, educational and other professional advice, consultation, and counselling, as well as to the public at large, to the detriment and deceit of such employers, organizations, and individuals, including competing coworkers or fellow employees, and to the detriment of the public at large." C.A. App. 19. Thus, the indictment charged that as a result of petitioners' scheme both employers and the general public would not get what they paid for—the assistance of properly trained individuals.[4]

In addition, each of the mail fraud counts alleged that the purpose of the scheme was to obtain money. See, *e.g.*, C.A. App. 24. The indictment therefore "fairly inform[ed petitioners] of the charges against which [they] must defend." *United States* v. *Bailey*, 444 U.S. 394, 414 (1980) (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)).

Petitioners' Fifth Amendment right to indictment by a grand jury was not violated by the district court's removal of the invalid intangible rights theory from the indictment. In *United States* v. *Miller*, 471 U.S. 130 (1985), this Court rejected a Fifth Amendment challenge where the defendant was convicted of a fraudulent scheme narrower and more limited than, but included within, the allegations of the indictment. "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly

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[4] The evidence at trial showed that employers provided jobs and promotions based on degrees issued by petitioners' institutions. Kathryn Mary Finlay, a teacher at St. Joseph's School in Collingdale, Pennsylvania, received a substantial pay raise based upon her DePaul degree. C.A. App. 1040-1047. James Kenneth Ballard used his DePaul degree to obtain teaching certification, a substantial salary increase, and a promotion to school principal. *Id.* at 912-922. The niece of Chicago pastor Paul J. Evans also obtained a teaching job on the basis of a DePaul degree. *Id.* at 839, 851.

set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." *Id.* at 136. Here, as in *Miller,* petitioners were convicted on account of a fraudulent scheme more limited than that charged, but one that was nevertheless clearly alleged in the indictment.[5]

In any event, petitioners' contention that the decision below conflicts with *McNally* is of no continuing importance. Congress has amended the mail and wire fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of this provision expressly states that it was intended to overturn *McNally.* 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). There is no doubt that petitioners' conviction would be valid under current law, because the evidence showed that as a result of the scheme employers and the general public were deprived of honest services from persons holding the credentials they claimed to have earned. Accordingly, petitioners' claim does not warrant review by this Court.

2. Petitioner Randall Fowler also seeks review of his claim (88-7305 Pet. 18-21) that his sentence was based on an erroneous estimate of the revenues of the diploma fraud. There is no merit to that fact-bound claim.

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[5] It is therefore clear that this is not a case in which there was an attempt to satisfy *McNally* through jury instructions alone. Thus, contrary to King's claim (88-1893 Pet. 9-11), the court of appeals' decision is not in conflict with either *United States* v. *Santa-Manzano,* 842 F.2d 1, 3 (1st Cir. 1988), or *United States* v. *Italiano,* 837 F.2d 1480 (11th Cir. 1988), where the theory presented to the jury was not contained in the indictment.

At Fowler's sentencing hearing, an FBI agent estimated that the fraudulent scheme netted about half a million dollars. Oct. 25, 1987, Tr. 2365. At a subsequent hearing for the other defendants, the United States Attorney, on the basis of an intervening report by the Internal Revenue Service, estimated that the diploma mills had generated revenues of about $600,000. About half of that sum was obtained during the time period covered by the indictment. Nov. 2, 1987, Tr. 22-23.

Fowler was properly sentenced. It is well settled that matters not charged in the indictment may be considered in imposing sentence. *Williams* v. *New York,* 337 U.S. 241, 244 (1949); *United States* v. *Bernard,* 757 F.2d 1439, 1444 (4th Cir. 1985); *United States* v. *Campbell,* 684 F.2d 141, 154 (D.C. Cir. 1982); *United States* v. *Sweig,* 454 F.2d 181 (2d Cir. 1972). Since the scheme generated about $600,000, Fowler was not prejudiced because the court relied on the $500,000 estimate in sentencing him. In any event, nothing in the record suggests that he would have received a lighter sentence had the monetary figure been scaled down from $500,000 to $300,000. Accordingly, this issue does not warrant further review by this Court.

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 88-1893

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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GAIL MARIE KING,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY BRIEF OF PETITIONER GAIL MARIE KING

---

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## REPLY BRIEF OF PETITIONER GAIL MARIE KING

---

In the petition, we established: (1) that the indictment in this case failed to allege a cognizable crime under the mail fraud statute as interpreted by this Court in *McNally* v. *United States*, 483 U.S. 350 (1987), because it alleged a deprivation of *intangible* rights only, and (2) that the decision below created a conflict in the circuits on the proper interpretation of the Fifth Amendment right to a grand jury by affirming the conviction based on a trial theory never contemplated by the grand jury in returning the indictment. In its opposition, the government relies upon only one substantive argument: that petitioner was not deprived of her right to a grand jury because the indictment in this case, read broadly enough, properly charges a deprivation of *tangible* rights,

as required by this Court in *McNally*, 483 U.S. 350. Br. in Opp. 5-7. However, as set forth below (and in the petition), the United States' argument in support of the Fourth Circuit's decision directly conflicts with decisions squarely on point in the First and Eleventh Circuits and, accordingly, this Court should grant certiorari to resolve the conflict.

1. The government's argument that petitioner was tried on the same theory relied upon by the grand jury is patently incorrect for several reasons. First, there can be no doubt that the plain language of the indictment, read fairly and completely, clearly establishes that the grand jury returned the indictment on the theory that the citizens of North Carolina had been deprived of their expectations of properly educated individuals.[1] Second, the indictment in this case was returned shortly *before* this Court's decision in *McNally*—at a time when the mail fraud statute regularly was used to protect intangible rights. Thus, there is no reason to doubt that this indictment, which charges a classic "intangible rights" scheme, was drafted *solely* to allege injury to intangible rights. Finally, the government in its opposition does not dispute the argument in our petition that the only reason the government did not reindict after *McNally* was because of a statute of limitations problem and not because the grand jury had considered any property interests in handing down its indictment. Clearly, in light of these circumstances, this Court should reject the government's strained interpretation of the indictment.

2. Because the indictment fails to allege a deprivation of money or property, the Fourth Circuit necessarily re-

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[1] While there are occasional references to "money" and "tuition" in a few isolated places in the indictment, the scheme-or-artifice section—which describes the "fraud"—speaks *only* of injury to intangible expectations. Thus, the government's continued adherence to this argument is nothing more than a wishful reading of the indictment.

lied upon the government's claim that the evidence at trial and the jury instructions clearly established deprivation of tangible rights.[2] However, as pointed out in the petition, it is constitutionally impermissible for a court to consider whether the evidence and jury instructions charged a cognizable crime, where, as here, that evidence and instruction is at odds with the theory of the case relied upon by the grand jury which handed down the indictment.[3] Pet. 7-12. Indeed, any other result—*i.e.*, a result which allowed indictment and conviction on different theories of an offense—would render the right to grand jury indictment meaningless. See Pet. 10-11.

3. Finally, the government concludes that certiorari should be denied because this issue does not warrant review in light of Congress' recent amendment of the mail fraud statute in response to *McNally*. But, contrary to the government's assertion, this case is not based on a *McNally* issue; rather, this petition raises a fundamental issue concerning the proper interpretation of the Fifth Amendment right to a grand jury. In rendering its decision in this case, the Fourth Circuit placed itself in direct conflict with the sound analysis of the First and Eleventh Circuits with respect to the proper leeway to accord to a flawed indictment. Here, the court of appeals ignored the plain meaning of the indictment. By contrast, other circuits have relied upon the plain mean-

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[2] Indeed, in its opposition, the government again relies on the fact that the evidence at trial established that certain individuals had, in fact, been deprived of money and/or property, thereby suggesting that such evidence "cured" any deficiency in the indictment. Br. in Opp. 6 n.4. This is plainly wrong.

[3] The government's reliance on this Court's decision in *United States* v. *Miller*, 471 U.S. 130, 136 (1985), is misplaced. As stated in the government opposition itself (Opp. at 6-7), *Miller* applies only when "the elements of the offense that sustain the conviction are *fully* and *clearly* set out in the indictment . . ." (emphasis supplied). This requirement was not met here.

ing as a necessary means of ensuring the right to a grand jury. It is that conflict which warrants review by this Court.

## CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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